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**COMMENTS OF PUBLIC CITIZEN LITIGATION GROUP ON PROPOSED RULE
FOR DISCLOSURE OF OFAC CIVIL PENALTIES AND INFORMAL SETTLEMENTS**
July 19, 2002

Public Citizen submits the following comments on the Office of Foreign Assets Control's (OFAC) proposed disclosure rule regarding civil penalties and informal settlements. 67 Fed. Reg. 41658-41659 (June 19, 2002).

Public Citizen is a national, nonprofit consumer advocacy organization founded by Ralph Nader in 1971. Public Citizen advocates in the courts, legislatures and administrative fora for safer consumer products, corporate accountability, and openness in government decision making. Of particular importance here, Public Citizen has litigated many actions for disclosure of agency records under the Freedom of Information Act, 5 U.S.C. § 552, on behalf of individuals and public interest organizations. See, e.g., Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974); Public Citizen Health Research Group v. FDA, 704 F.2d 1280 (D.C. Cir. 1983); Mokhiber v. Department of the Treasury, DDC C.A. 01-1974 (EGS).

Public Citizen supports OFAC's proposal to disclose information about civil penalties and informal settlements to the public because disclosure of this information will promote openness and accountability, and will enhance the effectiveness of OFAC's enforcement efforts. The proposed rule states that OFAC intends to *make* public certain information about "civil penalties imposed and informal settlements, not less than quarterly," 67 Fed. Reg. 41458. More specifically, OFAC intends to release (1) the name of the entity involved, (2) the sanctions program involved, (3) a brief description of the violation, and (4) the amount of the penalty imposed or the amount of the agreed settlement. Id. Public Citizen believes that a policy of quarterly disclosure is commendable but not adequate. We also believe that the Department should promptly ~~make~~ its decisions on settlements and penalties available to the public pursuant

to the provisions of the Freedom of Information Act, 5 U.S.C. § 552, that require that certain agency records be made available for public inspection at the agency's website and reading room without a written FOIA request.

I. OFAC SHOULD ADOPT A POLICY OF REGULARLY RELEASING PENALTY AND SETTLEMENT INFORMATION, BUT SHOULD REVISE ITS PROPOSAL TO RELEASE MORE INFORMATION, MORE FREQUENTLY.

Public Citizen applauds OFAC's general commitment to making its enforcement activities more transparent to the public, and its specific proposal to regularly release information on OFAC settlements and penalties. OFAC's enforcement program involves thousands of cases, See Chart showing number of OFAC Enforcement Cases unavailable at <http://www.ustreas.gov/press/releases/docs/Combochart.pdf> the program, however, has been shrouded in secrecy for years because most cases are settled or resolved without any public disclosure of the entities involved, the amount of individual settlements or penalties, or the reasoning behind OFAC's decision to settle for a particular amount. OFAC has just recently begun to release records concerning settlements under the FOIA and has made some of them available on the Internet, See <http://www.treas.gov/foia/ofac/06252002/index.html>.

Public Citizen believes that disclosure of the penalties and settlements will inform the public about OFAC's policies, decisions and procedures. In addition, disclosure will enhance the deterrent effect of the civil penalty provisions because businesses will not wish to be publicly identified as violators of these laws. Perhaps most importantly, the government's policies concerning terrorists, foreign nations subject to economic sanctions, and asset transfer are subjects of active public debate. Information on the entities identified as violators of the laws that OFAC administers, the amounts involved in particular civil penalties and settlements, and the agency's reasons for these decisions, will help inform this debate by permitting the public to

evaluate the role of OFAC's enforcement program in the overall scheme of present and proposed government policies.

OFAC's recent decision to release information on enforcement cases will prove to be beneficial to consumers. The companies identified in OFAC's records concerning settlements include high-profile companies, such as Goodyear and IKEA, that have agreed to pay substantial sums to settle charges that they engaged in prohibited transactions in Cuba, Afghanistan, or other areas subject to economic sanctions. The consumers who patronize these companies and the investors that evaluate the companies' management are entitled to full disclosure of civil penalties imposed upon, and settlements accepted by, businesses because of OFAC's enforcement efforts.

While the proposed disclosure rule is a step in the right direction, there is no justification for the proposal that the disclosures may be made quarterly, or on some comparable periodic basis. It is not burdensome for OFAC to disclose the information listed in the rule once the agency decides on a civil penalty or approves a settlement. This information could easily be posted to a list on the Internet and at the agency's reading room on a daily basis. There does not seem to be any justification for delaying disclosure of this information, and withholding this information for up to three months will only increase the risk that the information will become stale and less useful to public evaluation of OFAC's activities. Delay in disclosing this information will also diminish the value of the disclosure in deterring violations by businesses who wish to avoid public disclosure that they have violated the laws that OFAC administers. Accordingly, we urge the agency to adopt a policy of disclosing settlements and penalties within a day after the settlement is reached or the penalty is imposed.

OFAC should **not** adopt its proposal **to** categorically exclude **from** its **public** disclosures information on penalties and settlements that involve individuals. (Proposed § 501.805(d)(2)(ii)). This special exemption for individuals is **unfounded**. We do not believe that the **FOIA** or general principles of **openness** in government decision **making** justify withholding **the** identity of **individuals** identified as violators in the course of **reaching** a settlement or **in** a penalty order. Personal **financial** information about the individual would **not** be disclosed by describing the violation or **alleged** violation, and disclosing the amount **of the** penalty. Moreover, if the identity of individual violators is not disclosed, it will not be possible to evaluate whether **OFAC is treating individuals equitably in** its enforcement efforts. **The** public should be permitted to weigh the information **about** the penalties **and** settlements **for** both companies and individuals, **and** decide whether violations by corporations should be evaluated differently than violations by individuals. If **OFAC** simply **withholds** information on **all** individuals involved in the penalties **and** settlements, the public's ability to assess these issues will be **preempted**,

II. OFAC SHOULD RELEASE RECORDS OF PENALTIES AND SETTLEMENTS IN ACCORDANCE WITH 5 U.S.C. § 552(a)(2).

Subsection (a)(2) of the **FOIA** requires that **certain** types of records—final **agency opinions** and orders rendered in the **adjudication of cases**, policy statements that affect the **public**, certain staff manuals, **and** records that the agency believes will **be** subject to written requests for disclosure under the Act — **must** be made available for public inspection **and copying** in both paper and electronic **form**. **This** is commonly referred to as the “reading room” provision of the **FOIA** because agencies fulfill these disclosure obligations by placing records in publicly-accessible **reading rooms** and **in “Electronic Reading Rooms”** on the Internet.

We believe that OFAC **has an** affirmative obligation to **make** its **decisions** concerning civil penalties **and** settlements available to the public under this provision. First, 5 U.S.C. § 552(a)(2)(A), requires **that OFAC make** available for public inspection **and** copying final **opinions and** orders made in the adjudication of cases. **A** decision to impose a civil penalty or enter into a **settlement as an** alternative to imposing a civil penalty constitutes **an order or** final decision **in** the enforcement proceeding. Consequently, **OFAC's** records concerning its decisions to conclude the proceedings with a penalty or settlement **fall** under this provision. Second, 5 U.S.C. § 552(a)(2)(E) requires that an agency make available **in** reading **rooms** records that, because **of their** subject matter, "have become or are likely to become the subject of **subsequent** requests for substantially the **same records,**" **We** think that the **public's** interest in **reports on** OFAC enforcement activities makes clear that **OFAC** is likely to receive **numerous** requests for these records "because of **their** subject matter." Accordingly, regular disclosure of the penalty **and** settlement records appear to be required by both subsections **(A) and (E)**.

Court **decisions** interpreting the **FOIA** confirm that **OFAC's** penalty **and** settlement decisions are the type of documents that should be made available to the public under 5 U.S.C. § 552(a)(2), without waiting for **a request**. **The Supreme Court** has ruled that memoranda prepared **by** General Counsel for the National Labor Relations **Board** that directed that **a charge** investigated **by** the **Board** be dismissed without **filing** a complaint must be disclosed **under** 5 U.S.C. § 552(a)(2), because these records constituted a final opinion in the adjudication of cases. **NLRB v. Sears, Roebuck & Co., 421 US . 132, 157-59** (1975). In another case, the **Court** of Appeals for the District of Columbia Circuit concluded that **Sears** established "as a general principle that action taken by **the responsible decision maker in an agency's decision-making** process which has the practical **effect of disposing of** a matter before the agency is final for

purposes of FOIA,” and triggers the obligation to disclose final orders, Bristol-Meyers Co.^{v.} FTC, 598 F.2d 18, 25 (D.C. Cir. 1978). Based on this principle, the Court concluded that a decision by the Federal Trade Commission “to terminate an adjudicatory proceeding or not to include a proposed charge in a Complaint is a ‘decision in a “case” and constitutes an “adjudication” . . . (of) ‘the whole or part of . . . a matter” before the agency.” Id. at 25-26. OFAC’s penalties and settlement decisions are analogous to these final orders. OFAC’s decision to impose a penalty is a final order adjudicating the alleged violation, and a decision to enter into a settlement rather than pursue a civil penalty is analogous to the NLRB and FTC decisions that the courts in Sears and Bristol-Meyer found to be subject to 5 U.S.C. § 552(a)(2).

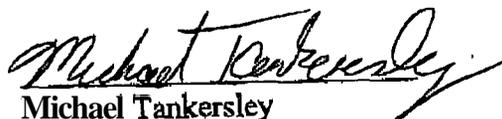
Subsection 552(a)(2)(E) has not been interpreted by the courts in this context because it is a relatively new provision adopted by Congress in 1996. The legislative history, however, shows that this provision was intended to “[r]equire that agencies make available for public inspection and reproduction copies of any records that, because of the nature of their subject matter, are likely to elicit additional requests,” H. Rept. 795, 104th Cong., 2d Sess. 31 (1996). The response to OFAC’s recent decision to release records concerning settlements under the FOIA leaves no doubt that if OFAC does not affirmatively disclose these records there will be additional requests.

CONCLUSION

OFAC’s recent decision to adopt a policy providing for regular disclosure of information about enforcement proceedings that result in civil penalties and settlements is admirable, but it does not go far enough. OFAC should disclose its decisions concerning penalties and settlements in its electronic and paper reading rooms promptly after the decisions are made. OFAC should not delay disclosure in favor of release on a quarterly or other periodic basis, and it should not

exclude actions where the violator or alleged violator is an individual from the disclosures. Such limitations would not be sound policy and appear to be inconsistent with the agency's obligations under the FOIA.

Respectfully submitted,



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